A **KAREN ISABEL WILFRED**

v.

DHYANA SHILA VASANTHAN

B HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI JC
[SUIT NO: 22NCC-424-06-2013]
4 DECEMBER 2013

C ***PARTNERSHIP:*** *Dissolution - Notice of dissolution - Failure to resolve issues between partners - Application under O. 33 r. 2 Rules of Court 2012 - Trial on preliminary issues - Whether resulted in substantial saving of time and expenditure - Conduct of parties - Issues on dissolution and expulsion - Whether related - Whether premised on*
D *interpretation of partnership agreement and Partnership Act 1961 - Whether power to expel another partner could only be exercised if there was express provision in partnership agreement to allow it - Whether partner defaulted in obligations - Whether partner could apply for dissolution of partnership - Whether partnership should be dissolved*

E ***CIVIL PROCEDURE:*** *Preliminary issue - Dissolution of partnership - Application for issue or question raised in pleadings to be tried on preliminary basis - Rules of Court 2012, O. 33 r. 2 - Scope of - Whether resulted in substantial saving of time and expenditure - Whether*
F *court empowered to determine any question or issue arising in cause or matter - Whether case suitable to be tried on preliminary issue - Conduct of parties - Whether partnership should be dissolved*

WORDS & PHRASES: *'Majority' - Meaning of - Partnership Act 1961, s. 27 - Expulsion of partner - Two partners in one firm - Whether*
G *one partner is in position to expel other partner - Whether one partner constitutes majority over other partner*

The plaintiff and the defendant were partners in a legal firm pursuant to a partnership agreement dated 1 July 2009. *Vide* a
H notice of dissolution issued to the plaintiff, the defendant gave notice to exit from the partnership and to dissolve the firm under the name of Wilfred Dhyan & Co ('the firm'). From March 2012 to October 2012, the parties continued with the exchange of e-mails and letters on their disagreements in relation to the
I accounts of the firm. In addition to that, the issue on the terms of the dissolution could not be resolved by the parties. The plaintiff then filed a suit which sought an order for the dissolution

of the partnership. In the statement of defence, the defendant raised several allegations on breach of fiduciary duty by the plaintiff and sought an order in the counterclaim that the plaintiff be expelled from the partnership. The plaintiff then filed an application under O. 33 r. 2 and/or O. 92 of the Rules of Court 2012 ('ROC') and the preliminary issue raised by the plaintiff was whether the firm should be dissolved. During submission, the parties also submitted on the issue of the expulsion of the plaintiff. However, the defendant contended that this was not a suitable case to be tried on a preliminary issue as there had been delay in filing the application and the facts were in dispute. Further, it was alleged that the plaintiff had defaulted in her obligations as a partner and therefore, the defaulting partner was not entitled to dissolve the firm. In essence, it was contended that the plaintiff's application should be dismissed as she was not coming to court with 'clean hands'.

Held (allowing plaintiff's application; declaring dissolution of partnership):

(1) The issue of delay is not a crucial matter in an application under O. 33 r. 2 of the ROC as the provision allows the court to consider the question or issue to be tried before, at or after the trial of the cause of matter. What is pertinent and crucial is that the trial of the preliminary issues will result in a substantial saving of time and expenditure. Further, O. 33 r. 2 of the ROC empowers the court to determine any question or issue arising in the cause or matter, whether the same had been raised in the pleadings or otherwise. (paras 18 & 21)

(2) The issues of dissolution of the partnership and the expulsion of a partner ('the two issues') were related issues and the disposal of these issues would dispose of the plaintiff's claim and part of the defendant's defence and counterclaim. Further, since the counterclaim was part of the pleadings, the issues raised therein could be considered to be tried as the preliminary issues. Therefore, the two intricately connected or related issues could be tried as preliminary issues, bearing in mind that the overriding objective of O. 33 r. 2 of the ROC is the substantial saving of time and expenditure. (paras 19 & 21)

(3) The trial of the two issues did not require a substantial consideration of facts and was premised on the interpretation of the partnership agreement and the Partnership Act 1961.

In any event, it was not in dispute that both the parties wanted to terminate the partnership, where the defendant had issued to the plaintiff a notice of dissolution. Thus, the two issues should be tried as preliminary issues since the facts on the dissolution and expulsion were not in dispute. (paras 23 & 26)

(4) It was impossible for the plaintiff and the defendant to place confidence in each other. There was no longer any trust in each other to sustain the partnership. As such, it was just and equitable that the partnership be dissolved. Under s. 37(f) of the Partnership Act 1961, it was not the function of the court to ascertain who the defaulting party was, as this was clearly provided for in s. 37(c) and (d). The court was only to ascertain whether the circumstances in the partnership had reached a stage where it was impossible for the partners to have confidence in each other and that such impossibility had not been caused by the person seeking to take advantage of it. On the facts, it was the defendant who had issued the notice to dissolve the partnership. (paras 30 & 33)

(5) Section 27 of the Partnership Act 1971 allows the majority in the partnership to expel any partner, provided that the power to do so is expressly conferred by the partnership agreement. From the use of the word 'majority' and 'numbers' (plural) in s. 27, this provision clearly excludes its application in a partnership where there is no greater number in partners, as in the present case, when there are only two partners. In such a situation, one partner is not in any position to expel the other partner, as one partner does not constitute a majority over the other partner. Further, the power to expel could only be exercised if there was an express provision in the partnership agreement to allow the same. (paras 35-37)

(6) Clause 10 of the partnership agreement provides for the expulsion and requires a notice in writing to be given to the defaulting party. On the facts, there was no notice in writing exhibited by the defendant. The defendant also did not plead in her statement of defence and counterclaim that a notice under cl. 10 had been issued to the plaintiff. Hence, there had been non-compliance with a mandatory requirement of cl. 10. The plaintiff could not be deemed to have retired on the date of the notice when no notice was issued in the first place. (paras 40 & 41)

Case(s) referred to:

Federal Insurance Co v. Nakano Singapore (Pte) Ltd [1992] 1 CLJ 539; [1992] 4 CLJ (Rep) 275 CA ***(refd)***

Langkawi R&D Academy Sdn Bhd v. Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors [2011] 1 LNS 342 HC ***(refd)***

Noorzilan Mohamed Noor & Anor v. Khairul Azman Kamaluddin & Ors & Anor Case [2003] 8 CLJ 419 HC ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Legislation referred to:

Partnership Act 1961, ss. 27, 37(a), (b), (c), (d), (e), (f)

Rules of Court 2012, O. 33 r. 2, O. 92 r. 4

For the plaintiff - Jennifer Chandran (Regina Khamis & Jimmy Chong with her); M/s Vasan Chan & Chandran

For the defendant - Kothai Ramamoorthy; M/s Jaya Sathi & Co

Reported by Kumitha Abd Majid

JUDGMENT

Azizah Nawawi JC:

The Application

[1] Pursuant to O. 33 r. 2 and/or O. 92 of the Rules of Court 2012, the plaintiff filed an application in encl. (22) for the following orders:

(i) Bahawa isu samada perkongsian firma guaman Tetuan Wilfred Dhyan & Co harus dibubarkan ('Isu tersebut') ditentukan sebagai soal atau isu awal untuk dibicarakan sebelum perbicaraan isu-isu atau soal-soal yang lain dalam tindakan ini menurut Aturan 33 Kaedah-Kaedah 2 dan/atau Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012;

(ii) Semua prosiding-prosiding selanjutnya dalam tindakan ini digantung sehingga penentuan Isu tersebut;

(iii) Apa-apa arahan selanjutnya yang diberikan mengikut budi bicara Mahkamah Yang Mulia ini bagi penentuan Isu tersebut sebagaimana yang perlu dan dianggap sesuai;

(iv) Apa-apa penentuan oleh Mahkamah Yang Mulia ini berkenaan dengan Isu tersebut jika memihak kepada Plaintif di sini, untuk perintah-perintah dan/atau relif-relif selanjutnya bahawa:

A (a) Satu Perintah bahawa perkongsian antara Plaintif dan Defendan di bawah nama Wilfred Dhyan & Co ('Perkongsian tersebut') dengan ini dibubarkan dari tarikh perintah tersebut; dan

B (b) Relief-relief sampingan seperti yang dipohon Plaintif dalam Pernyataan Tuntutan bertarikh 3 Mei 2013 dibenarkan yang dianggap wajar dan sesuai oleh Mahkamah.

[2] The grounds of the application are:

C (i) Isu tersebut boleh ditentukan sebagai isu awal dan tidak memerlukan satu perbicaraan penuh memandangkan isu pembubaran tersebut telah pun dimulakan oleh Defendan sendiri;

D (ii) Isu pembubaran yang telah dikemukakan oleh Defendan telah pun diterima oleh Plaintif dan pihak-pihak telah bersetuju untuk satu tarikh pembubaran pada 19 April 2012. Namun demikian, Defendan gagal mengambil sebarang langkah untuk meneruskan dengan pembubaran Perkongsian tersebut;

E (iii) Kini Defendan telah mengakui bahawa beliau ingin berpisah Perkongsian tersebut dengan Plaintif dan ingin menjalankan satu praktisnya di bawah firma guaman yang baru;

(iv) Berdasarkan pengakuan Isu tersebut ditentukan oleh Mahkamah Yang Mulia ini sebagai isu awal; dan

F (v) Penentuan oleh Mahkamah Yang Mulia ini berkenaan dengan Isu tersebut akan menjimatkan masa dan kos kehakiman secara substantif.

The Salient Facts

[3] Pursuant to a partnership agreement dated 1 July 2009 ('the G Agreement'), the plaintiff and the defendant are partners in a legal firm under the name of Wilfred Dhyan & Co.

[4] *Vide* a notice of dissolution dated 19 January 2012 issued to the plaintiff, the defendant gave notice to exit from the partnership H and to dissolve the firm under the name of Wilfred Dhyan & Co (see exh. "K1" annexed to the plaintiff's affidavit affirmed on 23 July 2013).

[5] From the exchange of emails between the parties on I 9 February 2012 and 10 February 2012 (see exh. "K2"), it is clear that the parties are still serious about the dissolution of the partnership. In her email to the plaintiff dated 9 February 2012 @ 7.06pm, the defendant wrote this:

> Anyway all sums can be reconciled and please stop making this an excuse to move to the next stage by providing me the terms of dissolution. The terms of dissolution will provide for the auditor and all will be resolved.
>
> Dhyana Shila

[6] The Bar Council was duly notified of the intention of the parties to dissolve the partnership (see exh. "K3"). There were scribbling on the proposed terms of the dissolution as can be seen from exh. "K4".

[7] A draft letter was prepared by the plaintiff to notify the Bar Council of the proposed dissolution. The said letter was signed by the defendant with the notes "signed on 17 April 2012 pursuant to the notice dated 19 January 2012". From para. (2) of the said letter dated 6 March 2012, the parties had agreed that they "are agreeable to dissolve by mutual consent the above named partnership effective on 19 April 2012." (see exh. "K5").

[8] From March 2012 to October 2012, the parties continued with the exchange of emails and letters on their disagreements on issues, especially on how the accounts of the firm are to be maintained and settled. There are also issues on the services of one Odelia Tang, the person in charge of the accounts. However, the issue on the terms of the dissolution could not been resolved by the parties. This led to the filing of the originating summons by the plaintiff on 13 December 2012 seeking an order for the dissolution of the partnership.

[9] On 25 April 2013, an order was granted by this court to turn the originating summons into a writ action with directions given on the filing of the statement of claim and the statement of defence.

[10] In the writ action, the plaintiff prays for an order that the partnership between the plaintiff and the defendant pursuant to the agreement dated 1 July 2009 under the law firm of Wilfred Dhyan & Co be dissolved, that the affairs of the partnership be wound up and several consequential orders.

[11] In the statement of defence, the defendant raised several allegations on breach of fiduciary duty by the plaintiff and seeks an order that the plaintiff be expelled from the partnership in the counterclaim.

A **Findings Of The Court**

[12] As this application is premised on O. 33 r. 2 and/or O. 92 r. 4 of the Rules of Court 2012, the threshold issue is to ascertain whether the case should proceed to be tried on question of law and/or on construction of documents. Once the court decides that this is a fit and proper case to be tried under O. 33 r. 2, the court will then enter the next phase and consider the merits of the questions posed before the court.

[13] The ambit of O. 33 r. 2 RHC 1980 was discussed by the Court of Appeal in the case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337. Delivering the judgment of the Court of Appeal, Mohd Noor Ahmad JCA (as His Lordship then was) held at p. 352:

> Order 33 r. 2 of the RHC states that the Court may order any question or issue arising in the cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in *Palaniappa Chettiar v. Sithambaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents were upheld, that concludes the whole proceedings and it would be unnecessary to try the other issues. In *SI Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1)* [1994] 1 CLJ 207, Lim Beng Choon J, after considering a large number of authorities on the ambit of O. 33 r. 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations:
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> (a) As a general rule the Court will exercise its power under O. 33 r. 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole;
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> (b) An order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit;
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> (c) Preliminary points of law have been described as too often of so-called issues of fact, the justification is even harder to discern;

(d) A preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

[14] Bearing in mind the above principles, the issue then is whether this is a fit and proper case to be disposed off under O. 33 r. 2 of the ROC 2012.

The Threshold Issue

[15] The issue raised by the plaintiff to be tried as preliminary issue is:

> Whether the firm of Messrs Wilfred Dhyan & Co ('the Firm'), should be dissolved. ('the dissolution issue')

[16] However during the submission, the parties also submitted on the issue of the expulsion of the plaintiff ('the expulsion issue') which was pleaded by the defendant in her statement of defence and counterclaim.

[17] It is the submission of the defendant that this is not a suitable case to be tried on a preliminary issue as there has been a delay in the filing of the application and that the facts are in dispute. This application has been filed on 23 July 2013 whereas the trial has fixed 12 September 2013. The application was fixed for hearing on 26 August 2013, but was adjourned to 6 September 2013 as the parties require time to file the affidavit. After hearing the application on 6 September 2013, the court allowed the application on 10 September 2013.

[18] However, I am of the considered opinion that the issue of delay is not a crucial matter in an application for O. 33 r. 2 as the provision allows the court to consider the question or issue "to be tried before, at or after the trial of the cause or matter". What is pertinent and crucial is that the trial of the preliminary issues will result in a substantial saving of time and expenditure. In fact, the Court of Appeal in *Langkawi R&D Academy Sdn Bhd v. Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors* [2011] 1 LNS 342; [2012] 2 MLJU 564 affirmed the decision of the High Court Judge who had directed (with the consent of parties) that the case is to be determined on preliminary issues on the first day of the trial.

[19] Having considered the pleadings of the parties, the only issue raised in the statement of claim is the dissolution of the partnership, whereas the statement of defence and counterclaim raised the issues of expulsion and the breach of fiduciary duty. I am of the considered opinion that the issues of dissolution and expulsion are related issues and that the disposal of these two issues will dispose the plaintiff's claim and part of the defendant's defence and counterclaim. I say that they are related issues because if I allow the dissolution, then the issue of expulsion is no longer relevant. Conversely, if I refuse the dissolution, I will have to consider whether the plaintiff should be expelled from the partnership, as the parties obviously want to terminate the partnership, whether through a dissolution or by way of an expulsion. Therefore, the trial of these two issues, that is on dissolution and expulsion, as preliminary issues will result in a substantial saving of time and expenditure.

[20] The learned counsel for the defendant further submits that the issue on expulsion is part of the counterclaim, which is a separate claim by the defendant against the plaintiff. As the defendant did not apply for the counterclaim to be determined by way of O. 33 r. 2, then the issue of expulsion cannot be determined in this application.

[21] Apart from my earlier finding that the issues of dissolution of the partnership and the issue of the expulsion of a partner are related issues, I am also of the view that O. 33 r. 2 is wide enough to allow the court to deal with related or intricately connected issues as preliminary issues. Order 33 r. 2 empowers the court to determine any question or issue arising in the cause or matter, whether the same has been "raised in the pleadings or otherwise". As the counterclaim is part of the pleadings in this case, then the issues raised in the counterclaim can be considered to be tried as the preliminary issues. Therefore, the two intricately connected or related issues can be tried as preliminary issues, bearing in mind that the overriding objective of O. 33 r. 2 is the substantial saving of time and expenditure. In *Federal Insurance Co v. Nakano Singapore (Pte) Ltd* [1992] 1 CLJ 539; [1992] 4 CLJ (Rep) 275; [1992] 1 SLR 390, the Court of Appeal of Singapore said this at p. 282 (CLJ); p. 397 (SLR):

> ... we may state as a general rule that the court will not exercise its power under Order 33 rule 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the

> trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim).

[22] It is also the submission of the defendant that the trial of preliminary issues cannot be sustained where the facts are in dispute. The defendant submits that before the court can make a determination on the issue of dissolution, the court must first ascertain the cause of the breakdown in the partnership and to determine who the defaulting party is, and this will involve a finding of the disputed facts. Learned counsel for the defendant submits that it is the defence of the defendant that the plaintiff has defaulted in her obligations as a partner and therefore the defaulting partner is not entitled to dissolve the firm.

[23] However, I agree with the submission of learned counsel for the plaintiff that the trial of these two issues (dissolution and expulsion) do not require a substantial consideration of facts and is premised on the interpretation of the partnership agreement and the Partnership Act 1961. In any event, it is not in dispute that both parties want to terminate the partnership, where the defendant had issued to the plaintiff a notice of dissolution dated 19 January 2012 seeking to dissolve the partnership. The said notice is clear and unequivocal, showing the intention of the defendant "to exit from the partnership and dissolve the firm under the name and style of Wilfred Dhyan & Co". The defendant had reiterated her position in an email dated 19 January 2012 at 1.50pm where she wrote this:

> Dear Karen,
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> I hereby am notifying you that I do not wish to carry on as a partner with you under name and style of Wilfred Dhyan & Co. The formal notice under the partnership agreement will be issued to you by my lawyers by the end of this week.

[24] Even as at 7 June 2013, the defendant maintains her position that the partnership is going to split. In an email to the landowner of the office, the defendant wrote this:

> Dear Stanley,
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> ... On the issue of renewal of tenancy agreement, please be informed that effective from October 2013 (exact date not determined), the partnership is going to split (business separation) where Karen and I are going to be running our separate law firms. Currently we have not decided who shall be taking over

A the tenancy in this premise as only one of us can enter the new tenancy with you while the other has to run from a different premise ...

[25] In another email to Stanley dated 23 June 2013, the defendant wrote this:

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... Please be informed that I am agreeable to renew the tenancy on the same terms as before (2+2). Will bank in the June rental next week.

C However, as my business will be carrying a new name from November 2013, we will have to sign the agreement to novate (transfer) the tenancy to me for carry on my legal firm in the new name ...

[26] As such, I am of the considered opinion that the two issues D of dissolution and expulsion should be tried as preliminary issue as the facts on the dissolution and expulsion are not in dispute.

The Substantive Issue

[27] The plaintiff's application for the dissolution of the E partnership is premised on s. 37(f) of the Partnership Act 1961 ('Act 135'), which reads:

37. Dissolution by the court

F On application by a partner, the court may decree dissolution of the partnership in any of the following cases:

(a) when a partner is found lunatic or is shown, to the satisfaction of the court, to be of permanently unsound mind, in either of which case the application may be made as well G on behalf of that partner by his committee, or next friend, or person having title to intervene as by any other partner;

(b) when a partner, other than the partner suing, becomes in any way permanently incapable of performing his part of the partnership contract;

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(c) when a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, is calculated to affect prejudicially the carrying on of the business;

I (d) when a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the

partnership business that it is not reasonably practical for the other partner or partners to carry on the business in partnership with him;

(e) when the business of the partnership can only be carried on at a loss; and

(f) whenever in any circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

[28] Section 37(f) of Act 351 was considered by court in *Noorzilan Mohamed Noor & Anor v. Khairul Azman Kamaluddin & Ors & Anor Case* [2003] 8 CLJ 419. At p. 438b-c, Justice Malik Ishak (as His Lordship then was) held as follows:

> Of course, the court is empowered and may dissolve the Firm when it is of the opinion that it is 'just and equitable' to do so. (see s. 37(f) of the Partnership Act 1961 ('Act 351'). In the words of Lord Cozens Hardy MR in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, at p. 430:
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> > ... Refusal to meet on matters of business; continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation must have been held sufficient to justify a dissolution. *It is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary to is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.* (emphasis added)

[29] From the affidavits before me, there is here an irretrievable breakdown in the relationship between the parties with the continued quarrelling and the refusal to meet on the business of the partnership. The partners are no longer on talking terms and are communicating through emails and letters. The parties cannot agree on the management of the accounts of the firm, the appointment of the accountant as well as on the appointment of the staff. In fact both partners have issued contradicting letters to one of the staffs, one Revathy Subramaniam. The defendant had also made arrangement to rent the same premise for her own business, not the partnership. The animosity between the parties have reached to such an extent that it precludes all reasonable

hope of reconciliation and friendly co-operation. This can be seen from an email sent by the defendant to the plaintiff on 29 August 2012 at 5:19pm:

> Like I said earlier, if after eight months you are repeating yourself, well then I have nothing to say. Do as you please but note that if you and your staff get in my way and my work, I will not take it lightly as you are a business competitor. So do get rid of yourself or disappear out of my sight as you don't exist in my list of persons that I know. Cheers.

[30] I am of the considered opinion that on the said facts, it is impossible for the plaintiff and the defendant to place confidence in each other. There is simply no longer any trust in each other in order to sustain the partnership. As such, it is just and equitable that the partnership be dissolved.

[31] However, the defendant submits that the plaintiff cannot apply for the dissolution because she is the 'defaulting party' and that her application should be dismissed as she is not coming to the court with 'clean hands'.

[32] Section 37 of Act 351 provides six specific cases where the court may decree a dissolution of the partnership. Sections 37(a) to (e) provides specific grounds to dissolve the partnership. This includes grounds of lunacy or mental disorder (s. 37(a)) and the incapacity of the partner (s. 37(b)). With regards to the conduct of parties, s. 37(c) provides ground premised on conduct prejudicial to the partnership, whereas s. 37(d) apply to situation where there has been a wilful or persistent breach of the partnership agreement or unreasonable conduct. Section 37(e) allows a dissolution on economic ground, that the business was carried on at a loss. It is only in s. 37(f) that gives the court a general power to look at the factual matrix on the partnership in order to ascertain whether it is just and equitable that the partnership be dissolved.

[33] Therefore, I am of the considered opinion that under s. 37(f), it is not the function of the court to ascertain who the defaulting party is, as this has clearly been provided for in ss. 37(c) and (d). The court is only to ascertain whether the circumstances in the partnership had reached a stage where it is impossible for the partners to have confidence in each other and that such impossibility has not been caused by the person seeking to take

advantage of it. From the affidavits before me, it was the defendant who had issued the notice dated 19 January 2012 to dissolve the partnership.

[34] The next issue is on the expulsion of a partner under s. 27 of Act 135, which reads:

> 27. Expulsion of partner.
>
> No majority of the partners can expel any partner, unless a power to do so has been conferred by express agreement between the partners.

[35] Section 27 allows the majority in the partnership to expel any partner, provided that the power to do so is expressly conferred by the partnership agreement.

[36] The word 'majority' is defined in the *Oxford Advance Dictionary* to mean "greater number". From the use of the word 'majority' and 'numbers' (plural) in s. 27, this provision clearly excludes its application in a partnership where there is no greater number in partners, as in the present case, when there are only two partners, each holding 50% shares in the partnership. In such a situation, one partner is not in any position to expel the other partner, as one partner does not constitute a majority over the other partner.

[37] Further, the power to expel can only be exercised if there is an express provision in the partnership agreement to allow the same. In the present case, the defendant relied on cl. 10 of the partnership agreement, which reads:

> **10. Expulsion of Partner**
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> 10. If a partner:
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> 10.1 is unable to perform his duties as a partner by reason of illness, injury or other cause for a period of 6 consecutive months, or for an aggregate of 6 months or more during any period of twelve; or
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> 10.2 commits an act of bankruptcy or is adjudged bankrupt or allows his share of the partnership to be charged for his separate debt under the Partnership Act 1961; or
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> 10.3 becomes a patient under any statute relating to mental health; or

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10.4 commits a grave breach or consistent breaches of this agreement; or

10.5 is guilty of conduct likely to have a serious affect upon the partnership; or

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10.6 absents himself from the business of the partnership without proper cause and without the consent of the Managing Partner, for more than 3 months in any period of twelve months,

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then the Managing Partner (or, if the Managing Partner is the defaulting party, the other partners), becomes aware of the circumstances, the Managing Partner (or, as the case may be, the **other partners**) may by **notice in writing determine the partnership** as far as it concerns the defaulting party. The **defaulting partner** shall be deemed to have retired on the date of the notice. (emphasis added)

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[38] It is the submission of the defendant that from April to July 2012, the plaintiff had committed various breaches of the partnership agreement that the plaintiff is deemed expelled from the partnership under cl. 10 with effect from 30 July 2012.

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[39] The only issue then is whether there has been a strict compliance with cl. 10 of the partnership agreement for the expulsion to be effective. In *Noorzilan*'s case, the court said this with regards to an expulsion clause in a partnership agreement:

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> It is a correct proposition of the law to say and I so say that all clauses in partnership agreements conferring the powers to expel must be construed strictly. This is purely done in order to prevent abuse and to obviate the hardship of expulsion. (page 445/c)

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[40] Clause 10 requires a notice in writing to be given to the defaulting party. In the present case, there was no notice exhibited by the defendant and learned counsel for the defendant had also conceded to the fact that no notice under cl. 10 was exhibited. I also take note that the defendant did not plead in her statement

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of defence and counterclaim that a notice under cl. 10 had been issued to the plaintiff. In para. 7(1-19) of the statement of defence, the defendant listed a long list of the alleged breaches by the plaintiff. In para. 8, it is pleaded:

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> 8. Akibat kemungkiran-kemungkiran Plaintif secara berterusan, pihak Defendan menegaskan Plaintif telah dibuang (expelled) daripada perkongsian pada 30.7.2012 berdasarkan klausa 10 Perjanjian Perkongsian.

[41] Bearing in mind that the issue on expulsion was raised by the defendant in her statement of defence and counterclaim, that the notice pursuant to cl. 10 has not been pleaded in the statement of defence and counterclaim, and that no such notice was exhibited in any of the defendant's affidavit before this court, I am of the considered opinion that there has been a non-compliance with a mandatory requirement of cl. 10, that is the requirement to give a notice to the defaulting party. The plaintiff cannot be deemed to have retired on the date of the notice when no notice was issued in the first place.

[42] In conclusion, I allow the plaintiff's application and declare the dissolution of the partnership of the firm Wilfred Dhyan & Co together with the consequential orders.